SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 527

THE UNITED STATES OF AMERICA, PETITIONER,

vs.

STANLEY KLINGER, WILLIAM CANTOR AND MORRIS SANDLER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Proceedings in U.S.C.A. for the Second Circuit		
Statement under Rule 15 (b)	1	1
Record from U.S.D.C., Southern District of New York	3	
Indictment	3	2
Excerpts from transcript of testimony	15	9
Judgment and commitment	16	9
Notice of appeal for the defendants, William Cantor and Stanley Klinger	18	10
Notice of appeal for the defendant, Morris Sandler	20	11
Order of Court of Appeals granting motion for leave to proceed in forma pauperis	21	12
Stipulation and order extending time to file record (Omitted in printing)	22	12
Order of Court of Appeals re record, etc.	24	12
Stipulation and order extending time to file record (Omitted in printing)	26	12
Order amending caption	28	13
Stipulations as to record	30	14
Clerk's certificate (Omitted in printing)	33	15
Opinion, Hand, J.	34	16
Judgment	42	21
Order removing original record, etc.	44	21
Clerk's certificate (Omitted in printing)	46	22
Order extending time to file petition for writ of certiorari	47	22
Designation of record	51	22
Order allowing certiorari		25

1 In United States Court of Appeals for the Second Circuit
C 132-150

UNITED STATES OF AMERICA, *Plaintiffs-Appellees,*

v.

MORTIMER GRIEF, et al., *Defendants-Appellants.*

Statement under Rule 15(b)

The indictment herein C 132-150 was filed against the defendants Mortimer Grief, Stanley Klinger, William M. Zwang, William Cantor, Edward Goroff, Morris Sandler and Jack Burke on the 31st day of March, 1950.

On the 5th day of April, 1950, all the aforementioned defendants pleaded not guilty and released in Two Thousand Five Hundred ($2,500.00) Dollars bail. The defendant Zwang being absent the Court entered a plea of not guilty for him.

On the 24th day of May, 1951, Judge Sugerman signed a final Order severing the trial of the defendant Zwang and staying his trial sine die.

On the 7th day of January, 1952, the case came to trial before the Hon. Edward A. Conger and a jury. The defendant Goroff changed his plea of not guilty to one of guilty. Whereupon, sentence was deferred until the expiration of the trial on the request of Assistant United States Attorney Thomas Burchill. Mr. Burchill then made a motion to sever the case against the
2 defendant Burke, which motion was granted.

The trial was conducted against the defendants Grief, Klinger, Cantor and Sandler. From the 8th day of January, 1952 until and including the 5th day of February, 1952 when the jury returned a verdict of guilty as against the defendants Klinger, Cantor and Sandler and a verdict of not guilty as against the defendant Grief.

Defendants Klinger, Cantor and Sandler were sentenced on the 4th day of March, 1952 each to a term of two years. Bail was continued as to all defendants pending application to Judge Conger within one week.

A Notice of Appeal was served and filed by the defendants Klinger and Cantor on the 13th day of March, 1952 and by the defendant Sandler on the 14th day of March, 1952.

On the 7th day of April, 1952, the defendants Klinger and Cantor made a motion before the Court of Appeals for the Sec-

ond Circuit to have the appeal heard in forma pauperis, which motion was granted by the Court.

No question was referred to a Commissioner, Master or Referee.

3 In United States District Court

Southern District of New York

UNITED STATES OF AMERICA,

v.

MORTIMER GRIEF, STANLEY KLINGER, WILLIAM M. ZWANG, WILLIAM CANTOR, EDWARD GOROFF, MORRIS SANDLER and JACK BURKE, *Defendants.*

Indictment

The Grand Jury charges:

1. Beginning on or about January 1, 1946, and continuously thereafter, up to and including the date of filing of this indictment, at the Southern District of New York, MORTIMER GRIEF, STANLEY KLINGER, WILLIAM M. ZWANG, WILLIAM CANTOR, EDWARD GOROFF, MORRIS SANDLER and JACK BURKE, the defendants herein, did unlawfully, wilfully and knowingly combine, conspire, confederate and agree together and with each other and with Sidney Morgenbesser, Irving Schwartz, Max Targove, Irving Targove, Allen Shapiro, Isadore Shapiro, Harry Koenig, Martin Gilbert and William Braunstein, named as co-conspirators but not indicted herein, and with divers other persons to the Grand Jurors unknown, to defraud the United States of America in the exercise of its governmental function of controlling and rationing the purchase, sale and use of sugar free from unlawful impairment, obstruction, dishonesty, corruption and fraud, and to defraud the United States of America of and concerning its governmental function to have the lawful functions of the Office of Price Administration of the United States exercised and administered free from unlawful impairment and obstruction, corruption, improper influence bias, dishonesty, hope of unlawful reward, and fraud, and of and concerning its right to and interest in the conscientious, honest and faithful services, judgments, determinations and actions of the defendants, MORTIMER GRIEF, STANLEY KLINGER, WILLIAM M. ZWANG and WILLIAM CANTOR, as duly appointed employees of the Office of Price Administration, free from corruption, improper influence, dishonesty, bias, hope of unlawful reward and fraud.

4

2. That as said defendants and co-conspirators well knew, from the beginning of this conspiracy and continuously up to and including October 18, 1946, the defendant MORTIMER GRIEF, was an Enforcement Attorney in the Food Section of the Enforcement Division of the Office of Price Administration at New York, New York.

3. That as said defendants and co-conspirators well knew, from the beginning of this conspiracy and continuously up to and including September 20, 1946, the defendant STANLEY KLINGER, was an Investigator in the Food Section of the Enforcement Division of the Office of Price Administration at New York, New York.

4. That as said defendants and co-conspirators well knew, from the beginning of this conspiracy and continuously up to and including October 4, 1946, the defendant William M. Zwang, was an Investigator in the Food Section of the Enforcement
5 Division of the Office of Price Administration at New York, New York.

5. That as said defendants and co-conspirators well knew, from the beginning of this conspiracy and continuously up to and including September 20, 1946, the defendant WILLIAM CANTOR, was an Investigator in the Food Section of the Enforcement Division of the Office of Price Administration at New York, New York.

6. That as said defendants and co-conspirators well knew, during this conspiracy the co-conspirators, Irving Schwartz and Sidney Morgenbesser, were engaged in the wholesale Food business at 391 East 149th Street, Bronx County, State of New York, and at 3476 Bailey Avenue, Bronx County, State of New York, under the name of Boro Food Company, and had been issued an allowable sugar inventory by the Office of Price Administration, and maintained a sugar ration bank account at a branch of the Manufacturers Trust Company located at 155th Street and Third Avenue, Bronx County, New York.

7. That as the said defendants well knew, during this conspiracy the co-conspirator Allen Shapiro, was engaged in the operation of a retail food store at 1182 Second Avenue, under the name of A & G Grocery, and had been issued an allowable sugar inventory by the Office of Price Administration, and maintained a sugar ration bank account at a branch of the Manufacturers Trust Company located at 37 Avenue B, New York, New York.

6 8. That as the said defendants well knew, during this conspiracy the co-conspirator Isadore Shapiro was engaged in the operation of a retail food store at 1042 Third Avenue, un-

der the name of Service Dairies, and had been issued an allowable sugar inventory by the Office of Price Administration, and maintained a sugar ration bank account at a branch of the Corn Exchange Bank Trust Company located at 770 Lexington Avenue, New York, New York.

9. That as the said defendants well knew, during this conspiracy the co-conspirators Max Targove and Irving Targove were engaged in the operation of a retail food store at 731 Lexington Avenue, under the name of Lexington Fruit Shop, and had been issued an allowable sugar inventory by the Office of Price Administration, and maintained a sugar ration bank account at a branch of the Manufacturers Trust Company located at 711 Lexington Avenue, New York, New York.

10. That as the said defendants well knew, during this conspiracy the co-conspirator Harry Koenig, was engaged in the operation of a retail food store at 4601 Edgemere Avenue, Queens County, State of New York, under the name of Nel-Ben Dairy, Inc., and had been issued an allowable sugar inventory by the Office of Price Administration, and maintained a sugar ration bank account at a branch of the Corn Exchange Bank Trust Company located at 1912 Mott Avenue, Far Rockaway, Queens County, New York.

7 11. That as the said defendants well knew, during this conspiracy the co-conspirator Martin Gilbert, was engaged in the operation of a retail food store at 1547 President Street, Kings County, New York, under the name of President Grocery and Dairy Company, and had been issued an allowable sugar inventory by the Office of Price Administration, and maintained a sugar ration bank account at a branch of the Manufacturers Trust Company located at 257 Utica Avenue, Brooklyn, New York.

12. That as the said defendants well knew, during this conspiracy the co-conspirator William Braunstein, was engaged in the operation of a retail food store at 2523 Avenue U, Brooklyn, New York, under the name of Braustein Bros., and had been issued an allowable sugar inventory by the Office of Price Administration, and maintained a sugar ration bank account at a branch of the Manufacturers Trust Company located at 257 Utica Avenue, Brooklyn, New York.

13. It was a part of the conspiracy that co-conspirators Sidney Morgenbesser, Irving Schwartz, Max Targove, Irving Targove, Allen Shapiro, Isadore Shapiro, Harry Koenig, Martin Gilbert and William Braunstein, at the direction and guidance of the defendants, would issue sugar ration checks drawn on their respective

sugar ration bank accounts in amounts substantially in excess of the inventories allotted to them as aforesaid.

8 14. It was further a part of said conspiracy that the sugar ration checks issued as aforesaid would be given to sugar distributors by the defendants and by the co-conspirators at the direction of the defendants in exchange for approximately six million (6,000,000) pounds of sugar and syrup.

15. It was further a part of said conspiracy that the defendants and co-conspirators would conceal the identity of the purchasers of the sugar and syrup aforesaid by issuing false and fictitious invoices.

16. It was further a part of the said conspiracy that large quantities of sugar and syrup would be sold by the defendants and the co-conspirators at the direction and guidance of the defendants, at prices far in excess of the maximum ceiling prices therefor.

17. It was further a part of said conspiracy at a time fixed by the defendants, MORTIMER GRIEF, STANLEY KLINGER, WILLIAM M. ZWANG and WILLIAM CANTOR, defendants herein, as employees of the Office of Price Administration would merely recommend suspension of the co-conspirators from further dealings in sugar and would not refer their cases for criminal prosecution.

18. It was further a part of the said conspiracy that the said defendants and said co-conspirators would conceal the aforesaid acts and transactions and would do such other, further and different acts as they might deem necessary and advisable to prevent the disclosure of the existence of said conspiracy, and would
9 destroy records, books and documents, and would attempt to obtain the destruction of records, books and documents which might in any way evidence the existence of said conspiracy and any transaction in furtherance thereof, and would attempt to suppress and to obtain the suppression of any and all information and evidence of the acts made and done in furtherance of said conspiracy. (Title 18, Section 88, United States Code, (1946 Edition)).

Overt Acts

10 1. In pursuance of the said conspiracy and to effect the objects thereof, in and about the month of February 1946, at the Southern District of New York, the defendant STANLEY KLINGER had a conversation with co-conspirators Irving Schwartz

2. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 25th day of March, 1946, at the

Southern District of New York, the defendant STANLEY KLINGER did take and receive approximately $1500 in currency from co-conspirators Irving Schwartz and Sidney Morgenbesser.

3. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 26th day of March, 1946, at the Southern District of New York, the defendant STANLEY KLINGER did take and receive approximately $1250 in currency from co-conspirators Irving Schwartz and Sidney Morgenbesser.

4. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 27th day of March, 1946, at the Southern District of New York, the defendant STANLEY KLINGER did take and receive approximately $1500 in currency from co-conspirators Irving Schwartz and Sidney Morgenbesser.

5. In further pursuance of the said conspiracy and to
11 effect the objects thereof, in and about the month of April, 1946, at the Southern District of New York, co-conspirator Sidney Morgenbesser, doing business at Boro Food Company, signed a consent to an order suspending him from buying, selling, using or dealing in sugar for so long as sugar was rationed.

6. In further pursuance of the said conspiracy and to effect the objects thereof, in and about the month of March, 1946, at the Southern District of New York, the defendant MORRIS SANDLER had a conversation with co-conspirators Irving Schwartz, Sidney Morgenbesser and Allen Shapiro.

7. In further pursuance of the said conspiracy and to effect the objects thereof, in and about the month of May, 1946, at the Southern District of New York, the defendants STANLEY KLINGER and MORTIMER GRIEF had a conversation with co-conspirators Irving Schwartz, Sidney Morgenbesser and Allen Shapiro at 96 East 170th Street, Bronx County, New York.

8. In further pursuance of the said conspiracy and to effect the objects thereof, in and about the month of May, 1946, at the Southern District of New York, co-conspirators Irving Schwartz and Sidney Morgenbesser gave the defendant MORTIMER GRIEF a letter.

9. In further pursuance of the said conspiracy and to effect the objects thereof, in and about the month of July, 1946, at the Southern District of New York, the defendants STANLEY KLINGER and WILLIAM CANTOR had a conversation with co-conspira-
12 tors Irving Schwartz and Sidney Morgenbesser at 56 Featherbed Lane, Bronx County, New York.

10. In further pursuance of the said conspiracy and to effect the objects thereof, in and about the month of May, 1946, at the Southern District of New York, the defendant WILLIAM CANTOR had a conversation with co-conspirators Irving Schwartz, Sidney Morgenbesser and Allen Shapiro, at 1182 Second Avenue, New York, New York.

11. In further pursuance of the said conspiracy and to effect the objects thereof, in and about the month of August, 1946, at the Southern District of New York, the defendants WILLIAM CANTOR and STANLEY KLINGER had a conversation with co-conspirators Max Targove and Irving Targove at 731 Lexington Avenue, New York, New York.

12. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 19th day of August, 1946, at the Southern District of New York, the defendant WILLIAM CANTOR gave co-conspirator Max Targove approximately $1000 in currency.

13. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 6th day of September, 1946, at the Southern District of New York, the defendant WILLIAM CANTOR gave co-conspirator Max Targove approximately $1000 in currency.

14. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 28th day of August, 1946,
13 at the Southern District of New York, the defendant EDWARD GOROFF did take and receive from co-conpirator Max Targove a check drawn on the Manufacturers Trust Company, payable to the order of Quaker Sugar Co. in the amount of $2,193.75.

15. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 26th day of August, 1946, at the Southern District of New York, the defendant EDWARD GOROFF did take and receive from co-conspirator Max Targove a check drawn on the Manufacturers Trust Company, payable to the order of Quaker Sugar Co. in the amount of $4,387.50.

16. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 6th day of July, 1946, at the Southern District of New York, the defendant MORRIS SANDLER did take and receive from co-conspirator Allen Shapiro a check drawn on the Corn Exchange Bank Trust Company, payable to the order of Quaker Sugar Co. in the amount of $3,190.

17. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 9th day of July, 1946, at the Southern District of New York, the defendant MORRIS SANDLER did take and receive from co-conpsirator Allen Shapiro a check drawn on the Corn Exchange Bank Trust Company, payable to the order of Quaker Sugar Co. in the amount of $3,190.

18. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 9th day of July, 1946, at the Southern District of New York, the defendant MORRIS SANDLER did take and receive from co-conspirator Allen Shapiro, approximately $1000 in currency.

19. In further pursuance of the said conspiracy and to effect the objects thereof, in and about the month of July, 1946, at the Southern District of New York, the defendant WILLIAM M. ZWANG had a conversation with co-conspirator Martin Gilbert at 350 Fifth Avenue, New York, New York.

20. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 22nd day of October, 1946, at the Southern District of New York, the defendant JACK BURKE signed the name "Joseph Benjamin" on a power of attorney.

21. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 22nd day of October, 1946, at the Southern District of New York, the defendant JACK BURKE gave the power of attorney signed as aforesaid to a representative of the Public National Bank at 169th Street, Bronx County, New York.

22. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 22nd day of October, 1946, at the Southern District of New York, the defendant JACK BURKE signed the name "Joseph Benjamin" to a signature card at the Public National Bank at 169th Street, Bronx County, New York.

23. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 13th day of August, 1946, at the Southern District of New York, the defendant EDWARD GOROFF did take and receive from Floyd A. Ewald a check drawn on the Northwestern National Bank of Minneapolis, payable to the order of M. V. Armstrong, in the amount of $9,180.

24. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 13th day of August, 1946, at the Southern District of New York, the defendant EDWARD GOROFF did take and receive from Floyd A. Ewald a check drawn on the Northwestern National Bank of Minneapolis, payable to the order of M. V. Armstrong, in the amount of $8,160.

25. In further pursuance of the said conspiracy and to effect the objects thereof, in and about the month of December, 1946, at the Southern District of New York, the defendants WILLIAM M. ZWANG *and* MORTIMER GRIEF had a conversation with co-conspirator Harry Koenig at 52 William Street, New York, New York. (Title 18, Section 88, U.S.C. (1946) Edition).

15 IN UNITED STATES DISTRICT COURT

[Title Omitted]

Excerpts from Transcript of Testimony

New York, January 29, 1952

Trial resumed.

MR. TURKUS: Let me finish. On behalf of the defendant Grief, I move to dismiss the indictment against him for the following reasons:

THE COURT: Have you got a copy of that?

MR. TURKUS: Here is a copy. I am not going to read it into the record, Judge.

Motions to dismiss

THIRD: At this time I move to dismiss the indictment on the ground that it is founded upon alleged acts and declarations which occurred more than three years prior to the time the indictment was filed in March, 1950, and was therefore barred by the applicable statute of limitations governing a conspiracy of the United States Code Annotated.

MR. BERMAN: Now in connection with dismissing the indictment, I make the same motions and applications as defendants Cantor and Klinger as has been made by both Mr. Turkus and Mr. Bender in a written memorandum handed up to the Court, in so far as they are applicable to both my clients, Cantor and Klinger, with the same force and effect as if I reiterated them and stated them at length before this Court.

THE COURT: All right.

New York, February 1, 1952

Trial Resumed.

MR. BENDER: All right. We now reiterate all our motions, your Honor, made prior to the trial, made during the trial, and made after the Government rested its case. And, of course, we move for directed verdicts of acquittal for all of the defendants on trial.

THE COURT: That is denied.

MR. BENDER: Exception.

16 IN UNITED STATES DISTRICT COURT

[Title Omitted]

Judgment and Commitment—Filed March 4, 1952

On this 4th day of March, 1952 came the attorney for the government and the defendant appeared in person and by counsel,

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty by a jury of the offense

of conspiring to defraud the United States of a governmental function in connection with the rationing of sugar and of the honest and faithful services of employees of the Office of Price Administration

Title 18, Section 88, U. S. Code (1946) Ed. as charged and the court having asked the defendant whether he has anything to say why the judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged
17 convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General of his authorized representative for imprisonment for a period of TWO (2) YEARS

Bail continued pending application to Judge Conger within one week.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

EDWARD A. CONGER
United States District Judge

18 IN UNITED STATES DISTRICT COURT

[Title Omitted]

Notice of Appeal for the Defendants—William Cantor and Stanley Klinger—March 12, 1952

1. The name and address of the Appellants:

William Cantor—95 Donor Avenue, East Paterson, New Jersey; Stanley Klinger—24 Cambridge Street, Roslyn, Long Island.

2. The name and address of the attorney—Abraham Berman, 745 Fifth Avenue, New York, N. Y.

3. The offense—To defraud the United States of America in the exercise of its governmental function of controlling and rationing the purchase, sale and use of sugar free from unlawful impairment, obstruction, dishonesty, corruption and fraud, and to defraud the United States of America of and concerning its governmental function to have the lawful functions of the Office of Price Administration of the United States exercised and administered free from unlawful impairment and obstruction, corruption, improper influence, bias, dishonesty, hope of unlawful reward, and fraud, and of and concerning its right to and interest in the con-
19 scientious, honest and faithful services, judgments, determinations and actions of the defendants.

4. A statement of the judgment giving the date and sentence—Sentenced on March 4th, 1952 to a term of two years in prison.

5. The name of the institution where now confined if not on bail—None; appellants being out on bail.

I, Abraham Berman, Esq., as attorney for the above-named Appellants, hereby appeal to the United States Court of Appeals for the Second Circuit from the above-stated judgment.

New York,

ABRAHAM BERMAN
Attorney for Defendants-Appellants
Office & P. O. Address
745 Fifth Avenue
Borough of Manhattan
City of New York

20 IN UNITED STATES DISTRICT COURT

[Title Omitted]

Notice of Appeal for the Defendant, Morris Sandler—March 14, 1952

Morris Sandler—351 F.D. Roosevelt Drive, New York City, New York—Appellant.

Louis Bender—41 Park Row, New York City, New York—Appellant's attorney.

Offense: A single count of conspiracy with others to defraud the United States in the operation of its sugar ration program and corrupting and impairing certain O.P.A. officials under Title 18, Section 88 U.S.C.A.

Judgment of conviction after a verdict of guilt by the jury entered on March 4th, 1952 and sentenced thereon on the same date to two years imprisonment.

Now on bail.

By his attorney Louis Bender, the above-named Appellant hereby appeals to the United States Court of Appeals for the Second Circuit from the above-stated Judgment.

Dated—March 14, 1952.

LOUIS BENDER
Attorney for the defendant Morris Sandler
Office & P. O. Address
41 Park Row
New York City
New York

21 IN UNITED STATES COURT OF APPEALS

* * * * * * * * * *

PRESENT:

HON. HARRIE B. CHASE,
HON. JOHN BIGGS, JR.,
HON. CHARLES E. CLARK,
Circuit Judges.

[Title Omitted]

Order Granting Motion for Leave to Proceed In Forma Pauperis—April 7, 1952

A motion having been made herein by counsel for Appellants for leave to proceed in forma pauperis,

Upon Consideration thereof, it is

ORDERED that said motion be and it hereby is granted.

s/ ALEXANDER M. BELL
Clerk

22 Stipulation and order extending time to file record

(omitted in printing)

* * * * * * * * * * *

24 IN UNITED STATES COURT OF APPEALS

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[Title Omitted]

Order Re Record, Etc.

A motion having been made herein by counsel for appellants William Cantor and Stanley Klinger to direct that the United States bear the expense of furnishing typewritten copies of the minutes of the trial and for an extension of time,

Upon consideration thereof, it is

Ordered that the appellants may proceed on the original
25 papers from the files of the United States District Court for the Southern District of New York and that the time to file the typewritten brief for appellants William Cantor and Stanley Klinger be and it hereby is extended to May 22, 1952.

Further ordered that argument of the appeal be and it hereby is set for June.

Further ordered that the motion be and it hereby is otherwise denied.

ALEXANDER M. BELL
Clerk

A true copy,
ALEXANDER M. BELL
Clerk

26 Stipulation and order extending time to file record (omitted in printing)

* * * * * * * * * * *

28 IN UNITED STATES DISTRICT COURT

* * * * * * * * * * *

C 132/150

UNITED STATES OF AMERICA, *Plaintiff*,

-against-

MORTIMER GREIF, STANLEY KLINGER, WILLIAM CANTOR, WILLIAM M. ZWANG, EDWARD GOROFF, JACK BURKE and MORRIS SANDLER, *Defendants*.

Order Amending Caption

MORTIMER E. GREIF having moved this Court for an order amending the caption herein, so as to drop the name of MORTIMER GREIF therefrom, from any and all future proceedings in regard to this matter and said motion having duly come on to be heard on the 12th day of May, 1952, and MORTON ZUCKERMAN, Esq., having appeared in favor of said motion and MYLES J. LANE, Esq., United States Attorney for the Southern District of New York, by THOMAS F. BURCHILL, JR., Esq., of Counsel, having appeared and having no opposition thereto, and due deliberation having been had thereon.

Now, on reading and filing the notice of motion dated April 9, 1952 and the affidavit of MORTIMER E. GREIF, duly verified the 29th day of April, 1952, having been submitted in support of said motion and no papers having been submitted in opposition, it is on motion of MORTON ZUCKERMAN, Esq., attorney for the moving party

29

ORDERED that the motion be and the same is hereby granted and it is further

ORDERED that the caption is hereby amended to appear as follows in all future proceedings had herein:

UNITED STATES OF AMERICA, *Plaintiff*,

-against-

STANLEY KLINGER, WILLIAM CANTOR, WILLIAM M. ZWANG, EDWARD GOROFF, JACK BURKE and MORRIS SANDLER, *Defendants.*

ENTER

GREGORY E. NOONAN
U.S.D.J.

30 IN UNITED STATES DISTRICT COURT

[Title Omitted]

Stipulation as to Record—May 16, 1952

IT IS HEREBY STIPULATED AND AGREED, that the foregoing as well as the original typewritten minutes of the trial transcribed by the Southern District Court Reports from Page 1 to 2404 inclusive is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.
Dated—New York, May 16, 1952.

MYLES J. LANE
Attorney for United States of America

LOUIS BENDER
Attorney for the defendant-appellant Morris Sandler

BERMAN & BERMAN
Attorneys for defendants-appellants William Cantor and Stanley Klinger

* * * * * * * * * * * *

Stipulation as to Record—May 21, 1952

31 The appellants herein and their counsel have represented and hereby represent to the appellee:

(1) That this transcript of the record contains all matter necessary fairly to present their points and such points as are relevant in reply.

(2) That in so far as the transcript of record purports to contain the stenographic minutes of proceedings, the minutes are set forth accurately, and omissions, if any, are clearly marked. Such omissions are only of matter wholly immaterial to any question raised on this appeal.

(3) That none of the exhibits are reprinted.

(4) That the transcript of the record contains all matters required to be set forth by applicable rules.

In reliance upon these representations, it is hereby stipulated and agreed by the undersigned that the foregoing is a true copy of the transcript of record of the District Court for the Southern District of New York in the above entitled matter as agreed
32 on by the parties, and further, that all the exhibits pertaining to this cause not reproduced herein, may be submitted to the Court upon the argument of the appeal, with the same force and effect as if reproduced herein and, further, if it should appear to the appellee that matter properly a part of the transcript of record has been omitted and has become material, despite the representations herein made, the appellee may, at its option, reprint such matter as an appendix to its brief or may require the appellants to reprint such matter, and use such matter with the same force and effect as if reproduced herein.

Dated—New York, May 21st, 1952.

MYLES J. LANE
United States Attorney

LOUIS BENDER
Attorney for Appellant Morris Sandler

BERMAN & BERMAN
Attorney for Appellants William Cantor and Stanley Klinger

33 Clerk's Certificate to foregoing transcript omitted in printing.

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34 IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES, *Appellee,*

v.

STANLEY KLINGER, WILLIAM CANTOR and MORRIS SANDLER, *Appellants.*

Opinion—Nov. 3, 1952

Before:

SWAN, *Chief Judge,*
L. HAND and FRANK, *Circuit Judges.*

Appeals from a judgment of conviction of the District Court for the Southern District of New York—Conger, *J.*—upon an indictment for a conspiracy to violate Section 371 (formerly 88) of Title 18 of the United States Code by defrauding the United States of the services of its employees in control of sugar rationing.

FREDERICK S. BERMAN, *for Cantor and Klinger.*
LOUIS BENDER, *for Sandler.*
ROBERT MARTIN, *for the appellee.*

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35 L. HAND, *Circuit Judge:*

The only point which we find it necessary to decide upon these appeals is whether the prosecution was barred by the Statute of Limitation. The convictions were under an indictment found on March 31, 1950, which charged the defendants with conspiracy to "defraud the United States";* that is, by "impairing, obstructing or defeating the lawful function of any department of Government,"** in this instance the rationing of sugar through the Office of Price Administration. It is not necessary to set out the evidence beyond saying that the prosecution did not prove that the conspiracy lasted beyond December 31, 1946; and that the result depends upon whether the three year period of limitation, which

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* §371 (formerly §88) Title 18, U. S. Code.

** *Haas* v. *Henkel,* 216 U. S. 462, 479.

concededly applied to the crime,† began to run on January 1, 1947, or on January 1, 1950. The answer to that turns upon the following clause in the Act of 1944: "The running of any existing statute of limitations * * * shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President." †† That act was an amendment of the first section of the Act of August 24, 1942;††† and in 1948, when the Criminal Code as a whole was amended, that Act was itself put into general terms, as follows: "When the United States is at war, the running of the Statute of Limitations is suspended" etc.;†††† and in that form it now appears as §3287 of Title 18 of the United States Code, which went into effect on September 1, 1948.††††† If §3287
36 had enlarged the period of limitation beyond the extension granted in 1944, it would govern this appeal, because the period fixed by the Act of 1944 had not expired in 1948; but the prosecution does not suggest that it did, and we shall confine our discussion to the Act of 1944.

If the words be read literally, there was no escape from holding that in computing the period of limitation of three years, one should start on January 1st 1950, and not on January 1st 1947; and it would of course follow that, for any crimes of the kind described, an indictment might be found at any time before January 1, 1953. On the other hand, if the clause was the same as though it read: "the bar of the statute is suspended until three years" etc., the period of limitation expired on December 31, 1949, and the indictment was too late. The word, "running," is a colloquial term, not a "word of art," coined *ad hoc*, and it does not appear to us that in this setting it so inexorably excludes the meaning, "bar," that it will not bear that construction, if only so will the purpose of the Act as a whole, be realized, and consequences avoided that Congress certainly would not have tolerated. We concede that in the Act of 1942,* which we quote in the margin, "running" did

† §3281, Title 18, U. S. C.

†† 58 St. at Large, p. 667.

††† 56 St. at Large, p. 747.

†††† 62 St. at Large, p. 828.

††††† 62 St. at Large, p. 862.

* The running of any existing statute of limitations applicable to offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, shall be suspended until June 30, 1945, or until such earlier time as the Congress by concurrent resolution, or the President, may designate. This Act shall apply to acts, offenses, or transactions were the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by the provisions of existing laws.

not mean "bar"; but that it was used to toll the statute of limitations until July 1st, 1945, or some earlier date; and our interpretation does therefore involve the assumption that Congress used the word in a different sense in 1944. The strength, and the
37 only strength, of the prosecution's argument is that we should not make that assumption, but should accept the literal meaning of the word; and to this we should yield, were it not that, (1), the construction we adopt preserves the original purpose of the Act of 1942 to extend existing periods of limitation only by the time which should elapse before the declared termination of hostilities; and that, (2), if the Act of 1944 in addition more than doubled the existing period of limitation for crimes committed before January 1st, 1947, a situation resulted, which we cannot imagine that Congress would have countenanced.

In *United States* v. *Smith*, 342 U. S. 225, the Supreme Court by a vote of five to four decided that the Act of 1944 did not apply to crimes committed between December 31, 1946 and January 1st, 1950; that is, that as to such crimes the "bar" of the statute was not suspended, and fell at the end of three years after they were committed. Not only was this the actual decision of all five of the justices, but the joint opinion of four leaves no doubt that they construed "running" as "bar," though it is true that they did not use that locution. The nub of their opinion was as follows, p. 229: "The prosecution would have us change the function of the date of termination of hostilities. It would provide various periods of suspension for crimes committed within the three-year period commencing with the termination of hostilities. That seems to us to be an alteration in the statutory scheme, one that destroys its symmetry. Since under our construction the three-year period prescribed by the Suspension Act starts to run at the date of termination of hostilities, all crimes to which the Act is applicable are treated uniformly. The time when law-enforcement officers were busy with war activities is not counted; when the pressure was off, the time began to run again. No reasons of policy are suggested for straining the language of the Act to suspend the running of the statute beyond the emergency which made the sus-
38 pension seem advisable." That can only mean that "three-year period" which "starts to run at the date of termination of hostilities" is the period prescribed for limitation; it cannot cover a preliminary term of three years before the period of limitation begins; for, if so, the prosecution would not have been barred. The minority opinion shows that this is how these four justices understood the others; for it takes issue with precisely that interpretation, saying, p. 231: "Until that time" December 31, 1949, "there was to be no statute of limitations. On that date the suspension was lifted, and the statute began to run again. The Court's

construction that the suspension was lifted at the termination of hostilities gives no effect to the three-year period." Hence the minority opinion gives no indication of how the four justices who concurred in it, would vote upon the question now at bar, assuming, as we should, that they would accept the actual decision of the Court that the Act did not apply to crimes committed between January 1st, 1947, and December 31st, 1949. Forced, as by hypothesis we are to assume that they would feel themselves to be, to hold that there *was* a statute of limitations before January 1st, 1950, at least as to some crimes; and that as to these it did not begin "to run *again*" on that day, we have no warrant for supposing that they would hold that, crimes committed before January 1st, 1947, might be prosecuted at any time before January 1st, 1953, although those committed between January 1st, 1947 and January 1st, 1950, must be prosecuted before that date. It is true that Justice Clark in his separate opinion, p. 231, did make such a distinction when he said that Congress meant to give the prosecution six years after December 31, 1946 within which to indict for crimes committed "between the date of the Act of 1942" (August 24, 1942), and December 31, 1946; but only three years after December
31, 1946, to indict for crimes committed before August 24,
39 1942,—to which could be added any part of the period of limitation which had not expired on August 24, 1942. Since, as we have shown, the four justices in the majority thought otherwise, we should not be warranted in assuming that the dissenting four would not accept their view. It seems to us therefore that we must choose between the views of the four and the argument of the prosecution, and, as *res integra*, we believe that, both from the language of the Senate Reports and the consequences that would otherwise ensue, the Act of 1944 used "running" in the sense of "bar."

The Senate Report* which accompanied the Act of 1942, declared that its "purpose" was "to suspend any existing statutes * * * applicable to * * * defrauding the U. S. * * * for the period of the war. * * * action should be taken * * * to extend the limitation statute so that frauds may be discovered and punished even after the termination of the present conflict and to insure that the limitations statute will not operate under stress of the present-day events." It was assumed that, if "the law-enforcement branch of the Government" had three years after June 30, 1945 or earlier, that would be time enough to "discover" any frauds which might have escaped detection, *bello flagrante*. The war was then only about nine months old, and by 1944 its demands upon our resources, in personnel as well as in materiél, may have become so great that,

* Senate Report No. 1544; 77th Congress 2nd Session.

although three years after the "shooting war" had ended had originally been thought enough, double that time then appeared necessary. However, if Congress had so changed its mind, the Senate Report which accompanied the bill** gave no such indication, unless it was in the words: "It is clear that the bulk of the offenses * * * will not be apprehended or investigated until the end of the war and will then require considerable time
40 before they advance to the stage of litigation." That language was certainly a most equivocal way of saying that accumulation of cases was so great that twice the time had become necessary to clear it up after "hostilities" had ended. And that aside, it would be unreasonable to impute to Congress a purpose to pass an act providing that crimes, committed before "hostilities" had ended, should have a period of limitation made up of all the time that has elapsed before that date, plus twice the period allowed for crimes committed after "hostilities" ended. All the crimes equally became a part of "the bulk of offenses cognizable under this statute" with which the "law-enforcement branch" had to deal after December 31, 1946; and there was no reason to suppose that the later crimes would be "apprehended or investigated" before the earlier. Indeed, so far as any speculation whatever is in order, it would be that the earlier offenses would be earlier discovered. Moreover, all such crimes would be equally injurious to the interests of the United States, so that we must not suppose that Congress would be more lenient as to a part of them than as to the rest. For these reasons we cannot see why, once it is settled that "running" means "bar" as to crimes committed after the "termination of hostilities," it does not mean the same thing as to crimes committed before, or to suppose that Congress meant to give the "law-enforcement branch" twice the time to detect the second that it was to have to detect the first.

We have not considered any of the other decisions upon the Act of 1944, because those decided before January 7, 1952, were superseded, when *United States* v. *Smith*, *supra*, was handed down, and so far as we know, the question has come up only once since that time—*United States* v. *Showalter*, 103 Fed. Supp. 806—although it is quite true that there the court took the contrary view to ours. We agree that the issue is not free from doubt; all
41 we can say is that the reasoning in that case does not persuade us. The issue involves the baffling question which comes up so often in the interpretation of all kinds of writings; how far is it proper to read the words out of their literal meaning in order to realize their overriding purpose? It is idle to add to the acres of paper and streams of ink that have been devoted to

** Senate Report No. 1057; 78th Congress 2nd Session.

the discussion. When we ask what Congress "intended," usually there can be no answer, if what we mean is what any person or group of persons actually had in mind. Flinch as we may, what we do, and must do, is to project ourselves, as best we can, into the position of those who uttered the words, and to impute to them how they would have dealt with the concrete occasion. He who supposes that he can be certain of the result, is the least fitted for the attempt.

Judgment reversed; indictment dismissed.

42 IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

* * * * * * * * * * * *

UNITED STATES, *Plaintiff-Appellee*

v.

STANLEY KLINGER, WILLIAM CANTOR & MORRIS SANDLER,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

Judgment—November 3, 1952

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed; indictment dismissed in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

ALEXANDER M. BELL *Clerk*

44 IN UNITED STATES COURT OF APPEALS

[Title Omitted]

Order Removing Original Records, Etc.—Dec. 5, 1952

An application having been made herein by the Solicitor General to have the original record certified and to remove said record from the files of this Court for filing with the Clerk of the Supreme Court of the United States for use in connection with a petition for a writ of certiorari,

Upon consideration thereof, it is

Ordered that said application be and it hereby is granted.

Further ordered that the Solicitor General do whatever is necessary to effect the return of said record to this Court on completion of the case in the Supreme Court of the United States.

THOMAS W. SWANN
Chief Judge

46 Clerk's Certificate to foregoing transcript omitted in printing.

47 SUPREME COURT OF THE UNITED STATES

No. ——, October Term, 1952.

[Title Omitted]

Order Extending Time to File Petition for Writ of Certiorari—Filed November 28, 1952

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 2, 1953.

ROBERT H. JACKSON
Associate Justice of the Supreme Court of the United States.

Dated this 28 day of November, 1952.

[File Endorsement Omitted]

51 IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 527

[Title Omitted]

Designation of Record

The Clerk will please print the following portions of the record in the above-entitled cause:

1. The following portions of Volume III:

a. Line 6 through line 12, inclusive, on page 1633.
b. Line 18 through line 24, inclusive, on page 1647.
c. Line 6 through line 14, inclusive, on page 1671.

2. The following portions of Volume IV:
a. Line 14 through line 21, inclusive, on page 2055.

3. All of Volume V.

WALTER J. CUMMINGS, JR.
Walter J. Cummings, Jr.
Solicitor General
Counsel for Petitioner

January 14, 1953

☆U.S. GOVERNMENT PRINTING OFFICE 1953—239175/P.O. 1031

Supreme Court of the United States

No. 527, October Term, 1952

THE UNITED STATES OF AMERICA, PETITIONER

v.

STANLEY KLINGER, WILLIAM CANTOR, AND MORRIS SANDLER

Order allowing certiorari

Filed April 6, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is assigned for argument immediately following Nos. 634, 635, and 636.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

249934—53

INDEX

	Page
Opinion below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	3
Reasons for granting the writ	5
Conclusion	14

CITATIONS

CASES:

Danebo Lumber Co. v. *Koutsky-Brennan-Vana Co.*, 182 F. 2d 489	8
Furrow v. *Koutsky-Brennan-Vana Co.*, 182 F. 2d 496	8
Hanger v. *Abbott*, 73 U. S. 532	10
United States v. *Beacon Brass Co.*, 344 U. S. 43	7
United States v. *Markowitz*, 34 F. Supp. 829	9-10
United States v. *Showalter*, 103 F. Supp. 806	7
United States v. *Smith*, 342 U. S. 225	5-6
United States v. *Wiley*, 78 U. S. 508	11

STATUTES:

Act of August 24, 1942 (56 Stat. 747), Section 1	9
Contract Settlement Act of 1944 (Act of July 1, 1944, 58 Stat. 649), Section 19(b)	11
Surplus Property Act of 1944 (Act of October 3, 1944, 58 Stat. 765, 18 U.S.C. (1946 ed.) 590a, Section 28	2, 12
Suspension Act of August 24, 1942, 56 Stat. 747, Section 1, as amended by Section 28 of the Surplus Property Act of October 3, 1944, c. 479, 58 Stat. 765, 781 (18 U.S.C. 590a)	2, 12
Uniform Code of Military Justice (Act of May 5, 1950, 64 Stat. 107, 50 U.S.C. (Supp. V) 618 (f)), Article 43(f)	8, 13
18 U.S.C. (Supp. V) 3282	4
18 U.S.C. (Supp. V) 3287	3, 7, 13

MISCELLANEOUS:

Black's Law Dictionary (3d ed.) 1572	9
Bouvier's Law Dictionary, Rawle's 3rd Revision, Vol. 2	10
90 Cong. Rec. 6059-6060	11
Hearings before Subcommittee of the Committee on Armed Services on H. R. 2498, 81st Cong., 1st sess., pp. 1044-1046	13
Presidential Proclamation 2714, 12 F. R. 1, December 31, 1946	4
S. Rep. 1544, 77th Cong., 2d Sess.	9
S. Rep. 1057, 78th Cong., 2d Sess., p. 14	11-12

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 527

UNITED STATES OF AMERICA, *Petitioner*

v.

STANLEY KLINGER, WILLIAM CANTOR, AND MORRIS SANDLER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, reversing respondents' convictions of conspiring to defraud the United States and dismissing the indictment on the ground that the prosecution of the offense was barred by the statute of limitations.

OPINION BELOW

The opinion of the Court of Appeals (R. 16-21) is reported at 199 F. 2d 645.

JURISDICTION

The judgment of the Court of Appeals was entered on November 3, 1952 (R. 21). On November 28, 1952, by order of Mr. Justice Jackson, the time within which to file this petition for a writ of certiorari was extended to and including January 2, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether, under the amended Wartime Suspension of Limitations Act, which suspended the "running" of any statute of limitations applicable to offenses involving fraud against the United States "until three years after the termination of hostilities", the applicable period of limitations began to run the day after the official termination of hostilities (December 31, 1946) or three years thereafter (December 31, 1949).

STATUTE INVOLVED

Section 1 of the Suspension Act of August 24, 1942, as amended by Section 28 of the Surplus Property Act of October 3, 1944 (c. 479, 58 Stat. 765, 781; 18 U.S.C. (1946 ed.) 590a), provided in pertinent part:

> Sec. 28. The first section of the Act of August 24, 1942 * * * as amended, is amended to read as follows:

> The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, * * * shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. * * *[1]

STATEMENT

On March 31, 1950, respondents were indicted for conspiracy to defraud the United States of the services of its employees in the control of sugar rationing (R. 2-8). The overt acts charged did not extend beyond December 1946.

The trial court denied motions to dismiss on the ground that the prosecution was barred by the statute of limitations (R. 9). Respondents were found guilty and were each sentenced to imprisonment for two years (R. 9-10).

The Court of Appeals for the Second Circuit reversed (R. 21), holding that the prosecution was barred by the statute of limitations. It ruled

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[1] This provision, with changes in phraseology not here significant, was codified in the revision of the Criminal Code as 18 U.S.C. (Supp. V) 3287. The Reviser's Notes indicate that the sole purpose of the changes was to make permanent the otherwise temporary suspension provisions.

that the amended Wartime Suspension of Limitations Act, *supra*, pp. 2-3, which provides that "the running of any existing statute of limitations [applicable to crimes of fraud against the United States during wartime] * * * shall be suspended until three years after the termination of hostilities * * *" (December 31, 1946)[2], suspended the statute of limitations only during hostilities, so that the normal three-year period of limitations (18 U.S.C. (Supp. V) 3282) became operative the day after hostilities were declared terminated, *i.e.*, on January 1, 1947. Thus, the court's view was that, as to all crimes covered by the Suspension Act which occurred during hostilities, the terminal date for prosecution was December 31, 1949. The court conceded that under a literal reading of the Act the applicable three-year period did not commence to operate until three years after the termination of hostilities (*i.e.*, December 31, 1949), and thus did not run its course until December 31, 1952 (R. 17). It also recognized that in the original 1942 suspension statute (Act of August 24, 1942) Congress used the words, "the running of any existing statute of limitations * * * shall be suspended," in their literal sense (R. 17-18). Nevertheless, it refused to apply the literal interpretation to the Act

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[2] Hostilities in World War II were officially declared terminated by Presidential Proclamation 2714, 12 F. R. 1, on December 31, 1946.

as amended in 1944. It read the word "running" in the later Act as meaning that the "bar" of the statute of limitations shall be suspended until the termination of hostilities.

REASONS FOR GRANTING THE WRIT

The decision of the court below—that as to crimes covered by the Suspension Act the statute of limitations began to run immediately on the termination of hostilities—is admittedly contrary to the language of the Act, is inconsistent with its legislative history and purpose, and is opposed to the views already expressed by a majority of this Court. It presents an important question in the administration of the criminal law, affecting a large number of pending cases.

1. The holding of the Court of Appeals is not only contrary to the literal words of the statute, which provides that the "*running* of any existing statute of limitations * * * shall be suspended until three years after the termination of hostilities" (italics supplied), but is also contrary to the interpretation accorded the Act by a majority of this Court in *United States* v. *Smith*, 342 U.S. 225. In the *Smith* case, five members of the Court joined in the opinion of Mr. Justice Douglas which held that the Suspension Act did not apply to offenses committed after the termination of hostilities (after December 31, 1946). The Court was not called upon to decide the question of the effect of

the Act on crimes committed during the period of hostilities. Nevertheless, the separate concurring opinion of Mr. Justice Clark (who joined in the majority opinion) explicitly states (342 U.S. at 231): "For those offenses which occurred between the date of the 1942 Act and the cessation of hostilities, Congress' intention was to give the Department of Justice six years from the latter date to investigate and prosecute." And the four members of the Court who joined in the dissenting opinion of Mr. Justice Minton expressed the view that Congress intended that until three years after the termination of hostilities, "there was to be no statute of limitations," and that on December 31, 1949, "the suspension was lifted, and the statute began to run again." 342 U.S. at 231. The plain purport of that opinion is that, as to offenses committed during hostilities, the statute did not begin to run until three years after the date of termination. Contrary to the belief of the court below (R. 18-19), nothing in the majority opinion or holding in the *Smith* case precludes the four dissenting Justices, or Mr. Justice Clark, from adhering to their reading of the statute as to the issue here involved. For the reasons given by Mr. Justice Clark (342 U. S. at 230-231), there is no incongruity in holding that, in the case of a crime committed during hostilities, the three-year limitations period began to run on December 31, 1949, but that for crimes

occurring after hostilities had ended the statute commenced to run on the very date of the crime.[3]

2. The question is an important one. We are advised that it affects the timeliness of well over one hundred prosecutions in which indictments have been filed but which have not as yet been brought to trial. Some of these prosecutions involve serious frauds against the Government in connection with surplus property disposal and war contracts. Many of these wartime crimes have come to light only after lengthy investigation by the various government agencies involved in widely scattered sections of the country, so that the issue is likely to arise in other circuits.[4] It is to the in-

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[3] Nor is the dictum in the recent case of *United States* v. *Beacon Brass Co.*, 344 U.S. 43, authority for a contrary result. In holding that the indictment there involved, alleging a willful attempt to evade taxes under Section 145(b) of the Internal Revenue Code—an alleged attempt which was probably also a violation of former Section 35(A) of the Criminal Code—stated an offense within Section 145(b), this Court observed that the three year statute of limitations applicable to offenses under Section 35(A) had run. 344 U.S. at 45. But the possibility that the statute had been tolled by the suspension statute was neither raised nor presented to this Court for decision in that case. Further, the offense involved in the instant case is of the type clearly comprehended by the suspension statute—whether or not false statements made in an attempt to evade taxes are so covered.

[4] *United States* v. *Showalter*, 103 F. Supp. 806 (N.D. Cal.), is a district court holding contrary to that of the court below. The proposition that the Wartime Suspension of Limitations Act suspended the statute of limitations until December 31, 1949, when it then began to run, was assumed by the

terest of both the defendants in such cases and of the Government that the question be promptly decided.

Moreover, in the revision of the Criminal Code, the Wartime Suspension Act has been made permanent legislation applicable whenever the United States is at war. 18 U.S.C. (Supp. V) 3287. A definitive construction by this Court of the existing statute will enable Congress to determine whether amendment is necessary or desirable for future periods.[5]

Further, the decision of the court below may well create serious confusion and unnecessary problems in matters involving the tolling of statutes of limitation in general. It may be safely stated that, until the decision below, the phrase "running of the statute," had a definite and certain meaning.[6] See *infra*, p. 9, n. 7. That decision, if allowed to stand, will introduce into the interpretation of statutes of limitation, and their tolling provisions, an unexpected and needless complication.

3. The opinion below concededly rejects the literal interpretation of the words used by Con-

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Court of Appeals for the Ninth Circuit in *Danebo Lumber Co.* v. *Koutsky-Brennan-Vana Co.*, 182 F. 2d 489, 491, and in *Furrow* v. *Koutsky-Brennan-Vana Co.*, 182 F. 2d 496, 499-450.

[5] As noted *infra*, p. 13, the Wartime Suspension of Limitations Act was also incorporated in the Uniform Code of Military Justice as Article 43(f) thereof, and will apply to military offenses of the same category.

gress, on the basis of a contrary intent which the court imputes to Congress. But the basis for imputing that contrary intent to Congress seems to be only the feeling of the court below as to what the proper policy should be. Such evidence as there is of Congressional intent is all to the contrary.

Thus, the opinion below admits that when in 1942 Congress passed the original Wartime Suspension Act, 56 Stat. 747, which provided that "the running of any existing statute of limitations applicable to offenses involving the defrauding or attempts to defraud the United States * * * shall be suspended until June 30, 1945 * * *", it used the words of the statute in their literal sense. As the report quoted in the opinion below (S. Rep. 1544, 77th Cong., 2d sess.) makes clear, Congress intended that the time limitation should not be operative during the specified period of postponement, but should commence when that period expired. See also *United States* v. *Markowitz*, 34

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[6] It is perhaps significant, in this connection, that although the opinion of Judge Learned Hand for the court below states that the term, "running" of the statute of limitations, is a "colloquial term" and not a "word of art" (R. 17), the opinion also states that the result of this case depends upon "whether the three year period of limitation * * * *began to run* on January 1, 1947, or on January 1, 1950" (R. 16-17). (Italics added.)

F. Supp. 827, 829-830 (N.D. Cal.).[7] Nowhere is there any indication that Congress had a different intention when it used exactly the same words, not in a new statute, but in an amendment which extended the life of the old. For the Suspension Act of 1944 amended the 1942 Act merely to provide, instead of the previously fixed terminal date of the suspension (*i.e.*, June 30, 1945), a period of suspension "until three years after the termination of hostilities * * *."

For the present problem, the most significant aspect of the legislative history of the Wartime Suspension of Limitations Act is that the two later amendments were promulgated during the latter part of the war when Congress was looking toward post-hostilities problems of reconversion. The first amendment of Section 1 of the Suspen-

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[7] The phrase, "running of the statute of limitations", is defined in Bouvier's Law Dictionary, Rowle's 3d Revision, Vol. 2, as "a metaphorical expression, by which is meant that the time mentioned in the statute of limitations is considered as passing." *United States* v. *Markowitz*, *supra* (34 F. Supp. at pp. 829-830). This same definition of the phrase is contained at p. 1572, Black's Law Dictionary (3d ed.). This Court has frequently adverted to the "running" of a statute of limitations in this same sense. One such example was in *Hanger* v. *Abbott*, 73 U. S. 532, where, in answer to a contention that a statute of limitations continued to run despite the fact that the courts were closed during the civil war, this Court said (73 U.S. at p. 542):

> "* * * Peace restores the right and the remedy, and as that cannot be if the limitation *continues to run* during the period the creditor is rendered incapable to sue, it

sion Act of August 24, 1942, was by Section 19(b) of the Contract Settlement Act of July 1, 1944, c. 353, 58 Stat. 649, 667.[8] Representative Gwynne, a manager of the Contract Settlement Act in the House of Representatives, explained its suspension provision as follows (90 Cong. Rec. 6059-6060):

> In this bill we have some very drastic penalties for fraud. Let me call your attention

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necessarily follows that the operation of the statute is also suspended during the same period." (Italics supplied.)

See also *United States* v. *Wiley*, 78 U.S. 508, where this Court said (at p. 513):

> "In *Hanger* v. *Abbott* it was decided that the effect of the war was to suspend the running of statutes of limitation during its continuance * * *."

[8] Section 19(b) provided: "The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the present war, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law."

> to them. In the first place, the running of the statute of limitations is suspended for 3 years after the war. That is, it ceases to run from the date the bill becomes effective until 3 years after the war; then it runs on until completion.

The Wartime Suspension of Limitations Act was again amended by Section 28 of the Surplus Property Act of October 3, 1944, c. 479, 58 Stat. 765, 781, *supra*, pp. 2-3. In its report on the bill (S. 2065) which became the Surplus Property Act, the Senate Committee on Military Affairs said (S. Rep. 1057, 78th Cong., 2d sess., p. 14):

> As was provided in the Contract Settlement Act of 1944, the statute of limitations with respect to offense against the laws of the United States arising in connection with activities under this act was suspended until 3 years after termination of hostilities in the present war. This provision has been necessitated by the magnitude of the operations involved under this act, and the intensive preoccupation of both participants and witnesses with the war effort. It is clear that the bulk of the offenses cognizable under this statute will not be apprehended or investigated until the end of the war and will then require considerable time before they advance to the stage of litigation.

The last sentence may be, as the opinion below states (R. 20), an equivocal way of saying that the bar of limitations should not fall for some period after the termination of hostilities, but it certainly points more in the direction of the literal reading of the statute than of the forced construction of the court below. And in the light of the fact that the amendment was merely extending a previous Act, the purport of which was admittedly clear, the sentence certainly furnishes no basis for departing from the plain meaning of the words used.[9]

At all times when the Wartime Suspension of Limitations Act was under Congressional scrutiny, a literal interpretation was given its language. This literal interpretation is fully consonant with the legislative purpose. For it is apparent that Congress intended in each instance to postpone the operation of statutes of limitation until a time when the intensive preoccupation of

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[9] The Suspension Act was incorporated as Article 43(f) of the Act of May 5, 1950, the Uniform Code of Military Justice, 64 Stat. 107, 50 U.S.C. Supp. V, 618(f), which became effective on May 31, 1951. At pp. 1044-1046, Hearings before a Subcommittee of the Committee on Armed Services on H.R. 2498, 81st Cong., 1st Sess., the subcommittee discussion adverted to the fact that 18 U.S.C. 3287 (see *supra*, pp. 2-3) was being incorporated into the Uniform Code and that its effect would be to create a period of suspension subsisting until 3 years after hostilities were officially terminated, at which time the statute of limitations would commence to run against prosecutions of crimes of fraud.

the Government with hostilities and with post-hostilities reconversion (especially in the area of contract termination and the disposition of surplus property) would be over, and the Government could apply itself to detection and prosecution of hidden crimes which flourish in a war situation.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

WALTER J. CUMMINGS, JR.
Solicitor General.

DECEMBER 1952.

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IN THE

Supreme Court of the United States

October Term, 1952

UNITED STATES OF AMERICA,

Petitioner,

—v.—

STANLEY KLINGER, WILLIAM CANTOR and MORRIS SANDLER,

Respondents.

BRIEF ON BEHALF OF RESPONDENT SANDLER IN OPPOSITION

LOUIS BENDER,
Attorney for Respondent Sandler.

EUGENE H. NICKERSON,
of Counsel.

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Respondent Sandler opposes granting the writ for the reasons that (1) the question of statutory construction of the Wartime Suspension of Limitations Act is of no general importance because even under the government's contention, the statute cannot apply to any future prosecution; and (2) there is no conflict of opinion between Courts of Appeals.

Opinion Below

The opinion of L. Hand, *Circuit Judge* (concurred in by Swan, *Chief Judge,* and Frank, *Circuit Judge*) (R. 16-21),* is reported at 199 F. 2d 645.

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* References to "R" indicate record printed by petitioner. References to "CAR" indicate Court of Appeals' record on file in this Court.

Reasons for Denying the Writ

Respondents were indicted on March 31, 1950 for alleged conspiracy to defraud the United States by impairing, obstructing or defeating the rationing of sugar by the Office of Price Administration. The alleged conspiracy admittedly did not last beyond December 31, 1946, the date of official termination of wartime hostilities, and thus the indictment was found more than three years after the end of hostilities.

The Court below held that the prosecution was barred by the three year statute of limitations* (concededly applicable), and rejected the government's argument that under the Wartime Suspension of Limitations Act, the statute of limitations did not even commence to run for three years after termination of hostilities. The pertinent wording of the Suspension Act provides that the "running" of the applicable statute of limitations "shall be suspended until three years after the [official] termination of hostilities in the present war." 18 U. S. Code (1946 ed.) 590a.

1. It is plain that the construction of a statute which can have no effect on future prosecutions, no matter what interpretation is given, is not such a pressing matter as to justify the attention of this busy Court. Even under the government's contention, indictments not found prior to December 31, 1952 are barred by the three year statute of limitations. A construction favorable to the government would not, therefore, permit future prosecutions of violations which have been lately discovered. Conversely, a construction favorable to respondent cannot have any general deleterious effect on law enforcement by the government. It is true that the Solicitor General states he is

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* 18 U. S. Code §3282.

"advised" that the question of interpretation is involved in over one hundred indictments not yet brought to trial. Even assuming this to be so, it can hardly be supposed that the deterrent effect of the criminal law will be materially lessened by dismissal of indictments for violations long since committed, where the dismissal is on grounds not available to future offenders. A "suspension" statute may have substantial deterrent effect during wartime, so that potential violators will not hope for escape because of the government's preoccupation with the war. But, by hypothesis, the construction, or indeed the past existence, of such a statute can have no deterrent effect where it cannot apply to any potential offender.

The Solicitor General does not make out a better case in this regard by claiming that "some of these prosecutions involve serious frauds against the government in connection with surplus property disposal and war contracts" (p. 7 of the petition). The statutory agencies are no longer in existence. The statutes which created such wartime agencies and empowered their actions have been repealed, and just as in the instant case involving the Office of Price Administration, the government is not confronted with any present problem as to future violations.

But more importantly, it is inconceivable that the Solicitor General can characterize the types of frauds as he did above, in view of the fact that in a letter under date of February 20, 1953 to Louis Bender, attorney for the respondent Morris Sandler, the Solicitor General says in part:

> "I have your letter of February 18 requesting a list of the prosecutions referred to in our petition for a writ of certiorari in this case. You asked for the dates of such prosecutions and the nature of the crimes charged.

> "I regret that we cannot furnish you this information. The statement in our petition to which you referred was based upon a canvass we made in December 1952 among the United States attorneys in continental United States. In that canvass and in the replies we received, the details as to the names of cases, dates of offenses and indictments, and the nature of the crimes involved were not elicited. Our effort was simply to get, within the limited time available to us, the number of cases affected by the *Klinger* decision of the Second Circuit."

The Solicitor General has made an assumption which is wholly unwarranted in view of his letter, wherein he advises that he is completely unaware of the nature of the crimes involved in the alleged one hundred or more prosecutions pending.

Equally unpersuasive is the government's contention that the Court should take this opportunity to interpret the Wartime Suspension Act because similar language has been inserted in the Criminal Code, to be applicable whenever the United States is "at war." 18 U. S. Code §3287. Since the United States is not presently "at war," there are no prosecutions pending or proposed involving this provision of the Code. Its construction at this time would thus be purely academic.

2. It is not contended that there are divergent opinions in the Courts of Appeals.* Therefore, there is no occasion

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* *United States* v. *Showalter*, 103 F. Supp. 806 (D. C. N. D. Cal. 1952) is said to be contrary to the decision below. However, no conflict in the Courts of Appeals for the Circuits can arise on this decision as we have been informed by the office of the Attorney General that the criminal information in that case was dismissed on motion of the government in April or May, 1952.

to make the administration of justice uniform throughout the circuits.

3. While the merits of the decision below is not in issue, the opinion (R. 16-21) of L. Hand, *Circuit Judge,* is highly persuasive. To give the Wartime Suspension of Limitations Act a construction which would more than double the existing period of limitation for crimes committed prior to January 1, 1947 would bring about a result which, in Judge Hand's words, "we cannot imagine that Congress would have countenanced" (R. 18).

Furthermore, such an extension of the limitation period would have particularly harsh effects in cases such as this, where it appears that Office of Price Administration records were destroyed long before the present indictment, except for those records which the government or any of its agencies wanted to preserve (CAR. 1999). Except for records necessary for its prosecution, the Department of Justice did not attempt to preserve any other records relating to the respondents and material to the issues in this case (CAR. 1603-1604). Consequently, official records which were admissible in evidence as either exculpatory, explanatory or contradictory of the government's case were not available to the defense (CAR. 2013-2014). This is an added but significant objection to more than doubling the statute of limitations.

It is respectfully submitted that the petition for a writ of certiorari be denied.

LOUIS BENDER,
Attorney for Respondent Sandler.

EUGENE H. NICKERSON,
of Counsel.